

## UTAH ABORTION LAW POST-*DOBBS*

### I. Utah Laws on the Books That Were Enjoined or Not Enforced Under *Roe* or Recent Litigation Post-*Dobbs*

In 1876, the Utah Territory adopted a law that banned abortion except to save a pregnant person's life:

#### **Terr. of Utah Comp. Laws § 1972 (1876)<sup>1</sup>**

Every person who provides, supplies or administers to any pregnant woman, or procures any such woman to take, any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than ten years.

A pregnant woman who acceded to an abortion was not an accomplice. *State v. Cragun*, 38 P.2d 1071, 1073 (Utah 1934) (discussing history). However, in 1898, Utah<sup>2</sup> created a separate, distinct offense criminalizing a pregnant person's act of self-managing their own abortion:

#### **Rev. Stat. Utah § 75-27-4227 (1898)**

Every woman who solicits of any person, any medicine, drug or substance whatever, and takes the same, or who submits to any operation or to the use of any means whatever, with intent thereby to produce a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years.

These laws were not significantly changed until Utah eventually repealed them in 1973, following *Roe*. 1973 Utah Laws 584, 684, ch.196 (sub.) ch.10, pt. 14.

In March 1973, following *Roe*, the Utah legislature enacted a law banning abortion after 91 days of pregnancy unless performed to save the life of a pregnant woman or prevent serious and permanent damage to her health. All abortions would require a judicial hearing and the consent of the woman's husband, or if she was unmarried, the "father of the fetus," and guardians or parents of a minor seeking abortion. Utah Code Ann. §§ 76-7-302 to -319 (1974). Additionally, notice to the "grandparents of the fetus" and county attorney were also required. Abortions at any stage could only be performed in hospitals, and any public or private hospital could refuse to admit a patient for the purpose of having an abortion. Except for the 91-day provision, these restrictions were struck down as unconstitutional. *Doe v. Rampton*, 366 F. Supp. 189, 192–94 (D. Utah 1973).

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<sup>1</sup> *Abortion*, THE COMPILED LAWS OF THE TERRITORY OF UTAH at 597 (1876), <https://collections.lib.utah.edu/details?id=719329> (last visited June 28, 2022).

<sup>2</sup> Utah became a State in 1896. See Presidential Proclamation No. 9, 29 Stat. 876–877 (1896).

In 1974, a policy requiring the director of the state Department of Social Services to personally approve an abortion for any woman receiving Medicaid was held unconstitutional by the 10th Circuit Court of Appeals. *Doe v. Rose*, 499 F.2d 1112, 1115 (10th Cir. 1974), *superseded by statute*, Act of Nov. 26, 1997, Pub. L. No. 105–119, §§ 103–04, 111 Stat. 2440, 2457 (1997) (the “Hyde Amendment”).

In 1991, Utah's governor signed the toughest anti-abortion measure in the 50 states at that time, prohibiting almost all elective abortions. The 1991 law outlawed abortion unless it was to save the pregnant person’s life, protect her health, or in the case of grave fetal defects, and in cases of rape or incest until the fifth month of pregnancy. It also required strict notice requirements. Abortion, 1991 Utah Laws 1 (S.B. 23); Criminal Code—Abortion—Liability for Criminal Homicide—Incest Exception—Grave Damage to Woman’s Health, 1991 Utah Laws 1st Sp. Sess. Ch. 2 (S.B. 4). The law’s provisions banning abortion before twenty-one weeks and requiring spousal notification were immediately held unconstitutional by a federal district judge. *Jane L. v. Bangerter*, 809 F. Supp. 865, 880 (D. Utah 1992), *aff’d in part, rev’d in part* 61 F.3d 1493 (10th Cir. 1995), *cert. granted, judgment rev’d on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137, 146 (1996). The provisions of the statute banning abortion after 20 weeks with only three narrow exceptions and regulating the manner in which post-viability abortions may be performed were also, ultimately, struck down. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996); *Jane L. v. Bangerter*, 61 F.3d 1505, 1505–06 (10th Cir. 1995).

In 2019, Utah enacted a law providing that “a person may not perform or attempt to perform an abortion after the unborn child reaches 18 weeks gestational age.” Utah Code Ann. § 76-7-302.5. Under this law, “gestational age” is measured from the patient’s last menstrual period. Utah Code Ann. § 76-7-301(5). There are limited, strictly defined exceptions. The law allows abortions after 18 weeks only if (1) The abortion is “necessary to avert the death . . . or a serious risk of substantial and irreversible impairment of a major bodily function”; (2) two physicians who practice maternal fetal medicine concur, in writing, that the fetus has a defect that is uniformly diagnosable and uniformly lethal or has a severe brain abnormality that is uniformly diagnosable (this does not include Down syndrome, spina bifida, cerebral palsy or any condition “that does not cause an individual to live in a mentally vegetative state”); or (3) the woman is pregnant as a result of rape . . . ; rape of a child . . . ; or incest . . . ; and before the abortion is performed, the physician who performs the abortion verifies that the incident . . . has been reported to law enforcement.” Utah Code Ann. §§ 76-7-302(3)(b)(iii)(A)–(B), -301(13).

Utah’s 18-week ban was challenged by Planned Parenthood of Utah and placed on hold pending the Supreme Court’s consideration of lawsuits challenging abortion restrictions in Louisiana and Mississippi, including *Dobbs*. *See* Order Grant. Salt Lake Cnty. Dist. Att’y Sim Gill & Planned Parenthood’s J. Stip. Mot. for Entry of Prelim. Inj. Relief, *Planned Parenthood Ass’n Utah v. Miner*, No. 00238-CW (D. Utah May 13, 2019) [hereinafter *Minor*]; Order Grant. Stay, *Miner* (Dec. 10, 2019); Order Grant. Second Stay (July 15, 2021). On June 27, 2022, after *Dobbs* overturned *Roe v. Wade*, the case was terminated by stipulation of the parties. *See* Civil Docket for *Miner*, available at <https://pacer.uscourts.gov/>.

In 2020, Utah lawmakers passed a “trigger law” that would go into effect if *Roe* were to be overturned. Abortion Prohibition Amendments, 2020 Utah Laws Ch. 279 (S.B. 174) (codified

at Utah Code Ann. §§ 76-7A-101 to -301). The law criminalizes abortion after “implantation of a fertilized ovum” and retains the same exceptions as the 2019 abortion law. Utah Code Ann. §§ 76-7A-101 to -201. Instead of making the trigger law immediately operative, the Legislature provided that the Act would take effect only upon the legislative general counsel’s certification “that a court of binding authority ha[d] held that a state may prohibit the abortion of [a fetus] at any time during the gestational period, subject to the exceptions enumerated in” the Ban. 2020 Utah Laws 279 at § 4(2) (S.B. 174). On June 24, 2022, the Utah legislative general counsel sent an e-mail to the Legislative Management Committee stating that he was certifying that the 2020 law had been triggered and took immediate effect. *See* E-mail from John L. Fellows, Gen. Couns., Utah Legis., to Legis. Mgmt. Comm. (June 24, 2022), *available at* <https://npr.brightspotcdn.com/5a/3c/f48d7a084fc7a8deb70e6a6fd1f8/sb-174-and-hb-166-now-in-effect.pdf> [<https://perma.cc/N4KM-W8M6>].

By its terms, Utah’s 2020 abortion law supersedes the 2019 law. Utah Code Ann. § 76-7A-301. However, on June 27, 2022, the 2020 trigger law was enjoined pursuant to a temporary restraining order granted by Salt Lake County Third District Judge Andrew Stone. *See* Order Grant. Pl.’s Mot. for TRO, Planned Parenthood Ass’n Utah v. State, No. 220903886 (3d Dist. Ct. Utah June 27, 2022). The lawsuit alleges that the 2020 law violates the state Constitution, specifically Utahns’ rights to determine their own family composition, free from government interference; equal protection; uniform operation of laws; bodily integrity; freedom of conscience; and right to privacy. *See* Compl. for Decl. & Inj. Relief at 2, Planned Parenthood Ass’n Utah v. State, No. 220903886 (3d Dist. Ct. Utah June 25, 2022). A hearing to determine whether a preliminary injunction will be entered is scheduled for July 11.

## II. Utah Abortion Regulations Currently in Effect that Have Criminal Penalties

### A. Medical Providers

Presently, the operable law appears to be the 2019 abortion law that bans elective abortion after 18-weeks. Intentionally terminating or causing the termination of a pregnancy after 18 weeks gestational age, unless the abortion is permissible under the narrow exceptions discussed above, is a second degree felony that is penalized by 1 to 15 years in prison and up to a \$10,000 fine. Utah Code Ann. § 76-7-314(3).

Additionally, certain second and third trimester abortion procedures, unless necessary to preserve the life and/or health of the pregnant woman; willful “experimentation” with a fetus, except to test for genetic defects or “selling” fetuses; and willfully intimidating or coercing a person to obtain an abortion, are third degree felonies. A third degree felony can be penalized by up to five years in prison and up to \$5,000 fine. Utah Code Ann. §§ 76-7-307 to -308, 310.5, -314, -326.

Utah’s definition of abortion does not include medical treatment of an ectopic pregnancy or miscarriage. Utah Code. Ann. § 76-7-301(b). Two physicians must “concur, in writing” that one of these conditions is met before administering treatment. Utah Code Ann. § 76-7-302.

Usually, “attempts” in Utah are deemed less culpable, and for most offenses, an attempt crime is lowered by one degree. *See e.g.*, Utah Code Ann. § 76-4-102(1). However, both Utah’s 2019 criminal abortion ban (currently in effect) and its 2020 trigger law (currently subject to a TRO), on their face criminalize the actual termination *or attempted* termination of a pregnancy. *Id.* at §§ 76-7-301(a), 76-7A-101(1)(a). Thus, the lesser culpability usually afforded to attempted crimes does not apply. *Id.* at § 76-4-301.

## B. Pregnant Persons

The definition of abortion refers to acts that end a pregnancy through “a medical procedure carried out by a physician or through a substance used under the direction of a physician.” Utah Code Ann. § 76-7-301(a). Pregnant persons seeking to obtain, or obtaining, a legal abortion that meets this definition are not criminally liable, even if their physician does not comply with the law. *Id.* at § 76-7-314.5.

Outside the context of a physician-managed abortion, “An act causing the death of another human being, including an unborn child at any stage of the unborn child’s development,” constitutes “criminal homicide.” Utah Code Ann. § 76-5-201(1)(a)(ii); *see also id.* at § 76-7-301.5 (“[t]he killing or attempted killing of a live unborn child in a manner that is not an abortion” is a “criminal homicide”); *State v. MacGuire*, 84 P.3d 1171, 1176 (Utah 2004) (discussing amendments to criminal homicide statute as it relates to coverage of an “unborn child”). Criminal liability under this provision requires an intentional or knowing act. Utah Code Ann. § 76-5-201(3)(c)(ii). Refusing to follow medical advice and refusing medical treatment, if they result in pregnancy termination, are not criminal homicides. *Id.* at §§ 76-5-201(c)(3)(b)(i)–(ii).

Intentionally self-managing an abortion could, in theory, be prosecuted as a criminal homicide under this statutory provision. However, such an application is arguably unconstitutional for at least two reasons. First, the term “unborn child” is not defined in the statute. Therefore, a court may hold that the statute is unconstitutionally vague, in violation of due process. *Cf. MacGuire*, 84 P.3d at 1179–80 (Parrish, J., concurring); *id.* at 1181 (Durham, J., dissenting). Second, because § 76-5-201(1) does not apply equally to physicians and others who abort a fetus, it may violate equal protection guarantees under the Fourteenth Amendment to the United States Constitution and article 1, section 24 of the Utah Constitution. *Id.* at 1177–78 (dicta). These legal arguments have not been tested; therefore, their resolution is uncertain, at best.

## C. Other Individuals

Those who assist women to obtain illegal abortions may be subject to criminal liability, as follows:

Aiding and Abetting: Under Utah Law, “Aiding and Abetting” is the same, as if the person committed the act personally. *See* Utah Code Ann. § 76-2-202; *Taylor v. Powell*, 7 F.4th 920, 934 (10th Cir. 2021) (“In Utah, accomplice liability is not a separate crime with different elements.”), *cert. denied*, No. 21-7329, 2022 WL 2111398 (U.S. June 13, 2022). Rather, under Utah law, “accomplices incur the same liability as principals.” *State v. Gonzales*, 56 P.3d 969,

972 (Utah Ct. App. 2002); *State v. Comish*, 560 P.2d 1134, 1136 (Utah 1977) (holding an accomplice can be charged with same offense as principal defendant). To show that a defendant is guilty under accomplice liability, the State must show that an individual acted with both the intent that the underlying offense be committed and the intent to aid the principal actor in the offense. *State v. Briggs*, 197 P.3d 628, 631–32 (Utah 2008).

“Inchoate” Crimes of Conspiracy and Solicitation: In Utah, a person is guilty of conspiracy “when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of the conduct and any one of them commits an overt act in pursuance of the conspiracy, except where the offense is a capital felony, a felony against the person, among others serious crimes, the overt act is not required for the commission of conspiracy.” Utah Code Ann. § 76-4-201. The penalty for conspiracy is lowered by one degree. Thus, a second degree felony becomes a third degree felony. *See e.g., Id.* at § 76-4-202(3). An actor commits criminal solicitation “if, with intent that a felony be committed, he solicits, requests, commands, offers to hire, or importunes another person to engage in specific conduct that under the circumstances as the actor believes them to be would be a felony or would cause the other person to be a party to the commission of a felony.” *Id.* at § 76-4-203(1). If the party solicited actually commits the offense, the actor may be prosecuted as a party to the offense, *id.* at § 76-4-202(5). Criminal solicitation is an independent crime. *See State v. Melancon*, 339 P.3d 151, 158 (Utah Ct. App. 2014). Like conspiracy, a solicitation to commit a crime is lowered by one degree. Thus, a second degree felony becomes a third degree felony. *See e.g.,* Utah Code Ann. § 76-4-204(1)(e).

### III. Utah’s Current Civil Framework Regulating Abortion

Utah has many provisions currently in effect that regulate access to abortions that are not explicitly tied to a criminal ban. These include:

- Informed Consent: Authorized medical providers or clinic staff must, via an in-person, face-to-face consultation before the procedure, present state-dictated informed consent information to the patient, including a statement of the state’s preference of adoption as an alternative to abortion, descriptions and visuals of an “unborn child” at several stages of development, counsel on the possible psychological effects of abortion, and “fetal pain” information. Utah Code Ann. §§ 76-7-305 to -305.5. If a physician does not comply with the mandatory informed consent requirements, then it is “unprofessional conduct,” which means their medical license could be revoked or suspended. *Id.* at § 76-7-305(7). In the case of medical abortion, counseling on abortion reversal to stop or reverse an already begun medication abortion is required. *Id.* at § 76-7-305(2)(d)(iv)
- Waiting periods: There is a mandatory seventy-two-hour waiting period before the procedure, except in the case of rape, incest, fetal defect or if the patient is less than age fifteen. Utah Code Ann. § 76-7-305. Failing to provide the required informed consent 72 hours before an abortion procedure is Class A misdemeanor, with a penalty of imprisonment of up to one year and a \$2500 fine.
- Restrictions on Insurance Coverage: Utah limits private insurance coverage of abortion. Utah Code Ann. § 31A-22-726. Private insurance policies cover abortion only in cases of

life endangerment, rape, incest, or if the woman's health is severely compromised or in cases of fetal impairment. *Id.* These exceptions may be narrowed further in light of *Dobbs*. Individuals and private providers may refuse to participate in abortion treatments. *Id.* at § 76-7-306.

- Targeted Restrictions on Abortion Providers (TRAP) laws: Utah requires abortion clinics to meet unnecessary and burdensome standards related to their physical plant, equipment and staffing. Utah Code Ann. §§ 76-7-301(7)(b), -302(4). Physicians have extensive reporting obligations, which include pathology reports of the fetus, affidavits, and certificates. *Id.* at §§ 76-7-313, -308.5, -309.
- Parental Notification: Parental notice and written consent are required for minors, unless the minor is married, a court approves of the abortion, or the abortion is necessary to avert the minor's death or an irreversible bodily impairment. Utah Code Ann. §§ 76-7-304 to -304.5; *H L v. Matheson*, 604 P.2d 907, 908 (Utah 1979), *aff'd sub nom. H. L. v. Matheson*, 450 U.S. 398, 413 (1981) (upholding these restrictions).

Violations have civil penalties such as license suspension or revocation for unprofessional conduct of physicians and “any action” against abortion clinics if they violate the law. Utah Code Ann. § 76-7-314. Married fathers, and maternal “grandparents” of the fetus if the pregnant person is less than 18, can file tort claims for money damages for all injuries, psychological and physical, occasioned by a violation of Utah's late-term abortion ban. *Id.* at § 76-7-327. In addition, civil actions are expressly “not precluded by aggrieved persons.” *Id.* at § 76-7-316.

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## Criminalization of Pregnancy & Reproductive Health State-by-State Reports

Consistent with our Mission, the National Association of Criminal Defense Lawyers has launched its Criminalization of Pregnancy and Reproductive Health Project (CPRHP) to support attorneys defending individuals and entities at risk of prosecution as a result of the criminalization of abortion and abortion services. Following up on our 2019 report *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs*, NACDL's CPRHP has worked with dozens of law professors and other legal experts to create this overview of relevant state laws including existing abortion laws, trigger laws that are or will soon be in effect, pre-Roe statutes that prosecutors might invoke, and fetal personhood laws. NACDL is committed to developing resources to prepare attorneys to advise clients and defend cases in the face of the criminalization of personal choice and health.

### NACDL's Criminalization of Pregnancy & Reproductive Health

This report was made possible by NACDL's Criminalization of Pregnancy & Reproductive Health efforts.

Learn more about this work at <https://www.nacdl.org/protecthealth>.

### Acknowledgements

Thank you to all the volunteers who contributed these state reports. See a full list of acknowledgements at <https://www.nacdl.org/protecthealththanks>.

### Disclaimer

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